SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 219

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

THE CONONIAL TRUST COMPANY, EXECUTOR OF THE WILL OF GLENN T. BRADEN, DECEASED

No. 220

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE WILL OF GLENN T. BRADEN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court, Western District of Pennsylvania

Docket entries

Among the rolls, records, and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania, at No. 3272 Law, may be found the following words and figures:

April 4, 1925, præcipe for summons and plaintiff's statement filed. Summons in assumpsit issued, returnable to first Monday of April, 1925.

April 6, 1925, writ returned served on D. B. Heiner, collector of internal revenue, together with copy of plaintiff's statement of claim, by handing to and leaving a true and attested copy thereof with D. B. Heiner, personally, at Pittsburgh, Pa., April 4, 1925.

April 13, 1925, præcipe for appearance of Walter Lyon, U. S. Atty., and Warren H. Van Kirk, spec. asst. U. S. Atty., for deft., filed.

May 11, 1925, amendment to statement of claim filed.

June 10, 1925, stipulation as to facts and amendments to statement filed.

June 29, 1925, affidavit of defense filed.

June 27, 1925, motion and order to strike statement filed and entered in the argument list.

July 2, 1925, order extending return day of rule to strike statement filed and entered.

2 Sept. 11, 1925, order extending return day of rule to strike statement filed and entered.

Sept. 30, 1925, order extending return day of rule to strike statement filed and entered.

Oct. 27, 1925, order extending return day of rule to strike statement to the date of the argument to be had of the questions of law raised by the affidavit of defense filed and entered.

Dec. 7, 1925, trial without a jury; coram; Thomson, J.

Dec. 31, 1925, opinion filed and entered awarding judgment for plaintiff.

March 6, 1926, præcipe for judgment and order filed and entered directing the clerk to enter judgment herein in accordance with said præcipe, as of December 31, 1925.

March 6, 1926, in accordance with præcipe and order of court this day filed and entered, judgment is hereby entered as of December 31, 1925, in favor of the plaintiff and against D. B. Heiner, collector of internal revenue for the twenty-third district of Pennsylvania, defendant, in the sum of four hundred eleven thousand one hundred twenty-seven and 07/100 ($411,127.07) dollars, with interest from December 31, 1925, and costs of suit.

J. Wood Clark, *Clerk.*

3 March 23, 1926, on petition, order made allowing writ of error as prayed for.

March 23, 1926, assignments of error filed.

April 6, 1926, citation awarded, issued, and service accepted by Sterrett & Acheson, Attys. for appellee.

April 6, 1926, writ of error issued and copy lodged in clerk's office.

April 8, 1926, stipulation for printing record filed.

In United States District Court

Statement of claim

The plaintiff, the Colonial Trust Company, executor of the will of Glenn T. Braden, deceased, claims of the defendant, D. B. Heiner, the sums of money hereinafter set forth, upon a cause of action whereof the following is a statement:

I

1. Plaintiff, the Colonial Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal office in the city of Pittsburgh, county of Allegheny, and western district of said State of Pennsylvania, and one of the powers conferred upon the plaintiff by the laws of said State and by virtue of its charter is the power to act as executor of the wills and as administrator of the estates of deceased persons.

4 2. Glenn T. Braden, above named, was at all of the times herein mentioned prior to his death a citizen and resident of the borough of Sewickley, in said Allegheny County, Pennsylvania, died testate in said borough, district, and State on the 23rd day of September, 1923, and by his last will, after his death duly probated and of record in the register's office in said Allegheny County in Will Book, vol. 182, page 539, he appointed plaintiff, the said The Colonial Trust Company, as executor of said will, and the plaintiff duly qualified as such and is the duly appointed and acting executor of the will of the said Glenn T. Braden, deceased.

3. The defendant, D. B. Heiner, is the duly appointed, qualified, and acting collector of internal revenue for the twenty-third district of said State of Pennsylvania, and has been so continuously during the time herein mentioned since August 1, 1921, which district includes the said borough of Sewickley, where the said Glenn T. Braden resided and filed his income-tax returns, and where he and his said executor paid the taxes assessed, as hereinafter set forth.

II

4. For a valuable consideration and as a result of treaty negotiations and the issuance of proper patents the Osage Tribe of Indians

acquired title to all of the lands now embraced in what is known as Osage County, Oklahoma. Reference is here made to a special act of Congress, approved June 5, 1872 (17 Stat. 228), as follows:

5 "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide said Osage Tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the Creek country and the main channel of the Arkansas River, and on the north by the south line of the State of Kansas: Provided, That the location as aforesaid shall be made under the provisions of Article Sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto: And provided further, That said Great and Little Osage Tribe of Indians shall permit the settlement within the limits of said tract of land (of) the Kansas Tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas Tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians.

"Approved June 5, 1872."

Also to another special act of Congress approved March 3, 1873 (17 Stat. 538), as follows:

6 "Indian Bureau.—That the Secretary of the Treasury is hereby authorized and directed to transfer from the proceeds of sale of the Osage Indian lands in Kansas, made in accordance with the twelfth section of the act of Congress approved July fifteenth, eighteen hundred and seventy, the sum of one million six hundred and fifty thousand six hundred dollars, or so much thereof as may be necessary to pay for lands purchased by the Osages from the Cherokees, and to place the same on the books of his department to the credit of the Cherokee Indians, the same shall bear interest at the rate of five per cent, in accordance with the act of Congress approved June fifth, eighteen hundred and seventy-two, entitled 'An act to confirm to the Great and Little Osage Indians a reservation in the Indian Territory,' and the acts of Congress and treaties therein mentioned and referred to, whenever the amount to be so transferred shall be certified to the said Secretary of the Treasury by the Secretary of the Interior."

5. The said Osage Tribe of Indians have at all times been and now are wards of the National Government; the relation of the United States as guardian of said Osage Tribe of Indians rests upon treaty obligations, acts of Congress, and policies adopted by the Government in dealing with the tribe, and said tribe has at all

times been and is now considered by the United States as a dependent people in the sense that they are subject to the paramount authority of the National Government; from time immemorial all tribal funds and property of the said tribe of Indians have been and now are held in trust by the United States of America, and said funds and properties have at all times been and now are inalienable in any form and are subject to no form of incumbrance or tax; the United States of America has assumed and is continuing to assume the burden, obligation, and duty of protecting the property of the said tribe against all forms of alienation and incumbrance; the United States, while empowered to administer the estate so committed to its care, is and has at all times been powerless to subject same to the payment of taxes or to any form of alienation or incumbrance; neither has the United States attempted to subject said trust estate to the payment of any form of tax.

7

III

6. By the Osage allotment act of June 28th, 1906 (34 Stat. 539), which is also a special act, the United States authorized the allotment of the lands in the Osage Nation to the members thereof in severalty, but specifically reserved by said act the right to develop for said Indians all of the lands embraced in what is known as the Osage Nation, of which the hereinafter mentioned lease owned by said Glenn T. Braden was and is a part, for oil and gas and other mineral purposes, as shown by the following provision of said act:

"Provided, That the surplus lands shall be nontaxable for the period of three years from the approval of this act, except where certificates of competency are issued or in case of the death of the allot'ee, unless otherwise provided by Congress: And provided further, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: And provided further, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by act of Congress."

8

"Sec. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals covered by selections and division of land herein provided for, may be made by the Osage Tribe of Indians through its tribal council, with the approval of Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, That the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of the United States: And provided further, That

no mining of or prospecting for any of said minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: Provided, however, That nothing herein contained shall be construed as affecting any valid existing lease or contract."

9 "Sec. 4. That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage Tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided."

7. The reservation thus contained in said act of June 28, 1906, was further extended by a further special act of Congress, approved March 3rd, 1921, as follows:

"Act Approved March 3, 1921

"An act to amend section 3 of the act of Congress of June 28, 1906, entitled 'An act of the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes.'

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all that part of the act of June 28, 1906 (Thirty-fourth Statutes at Large, page 539), entitled 'An act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes,' which reserves to the Osage Tribe the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is made in that act is hereby amended so that the oil, gas, coal, or other

10 minerals covered by said lands are reserved to the Osage Tribe for the period ending April 7, 1946: Provided, That all valid existing oil and gas leases on the 7th day of April, 1931, are hereby renewed upon the same terms and extended, subject to all other conditions and provisions thereof, until the 8th day of April, 1946, and as long thereafter as oil or gas is found in paying quantities, and the Secretary of the Interior and the Osage council are hereby authorized and directed to offer for lease for oil and gas purposes all of the remaining portion of the unleased Osage land prior to April 8, 1931, offering the same annually at the rate of not less than one-tenth of the unleased area."

Under the above acts the date of the expiration of the trusteeship of the United States over the oil, gas, and other mineral deposits of said Osage Nation or Tribe of Indians will not expire before April 7th, 1946.

IV

8. Having assumed the obligation and duty of developing the lands of the Osage Nation or Tribe of Indians for oil, gas, and other mineral deposits, the United States has, through the Department of the Interior, leased large portions thereof to individual oil operators

and oil companies; that among others acquiring an interest in said Osage Nation or Tribe of Indians' lands, as oil lessee, by approval of the Secretary of the Interior, was Glenn T. Braden, who, prior to the year 1917, acquired an undivided three-fourths (¾) interest in the

11 North half (N/2) of section 12, township 20 north, range 8 east, in Osage County, Oklahoma.

9. The said Glenn T. Braden, in compliance with the terms of said lease and the rules and regulations of the Department of the Interior, drilled a number of oil wells thereon and produced large quantities of oil therefrom.

V

10. He, the said Glenn T. Braden, agreed to pay as a royalty on the oil produced from said lease sixteen and two-thirds per cent (16⅔%) of the gross proceeds from the sale of the oil produced thereon from wells producing one hundred (100) barrels or less and twenty per cent (20%) as a royalty for all oil produced from wells producing more than one hundred (100) barrels per day. That in addition thereto certain other obligations were assumed by the said Glenn T. Braden not assumed by any lessee under any other form of lease in use in the Mid-Continent oil and gas fields; that said royalty is greatly in excess of the royalty usually paid by a lessee under the terms of what is known as commercial leases.

In the said transaction of lease between the said Glenn T. Braden and his said lessors it was not contemplated on either side that the lessee's income from his sale of his share of the oil produced by him from said Indian lands would be taxable by the United States

12 or by any taxing authority, and a correct summary of the main terms of the said lease to the said Glenn T. Braden, as lessee, and the terms of the commercial lease at the time and afterwards in universal use, including said oil territory, is as follows:

GLENN T. BRADEN, OSAGE LEASE	PRODUCERS, 88
Expires 1931.	Perpetual.
Grants only oil rights.	Grants oil and gas rights.
High bonus.	Low bonus.
Royalty on wells producing 100 barrels or less, 16⅔ per cent; over 100 barrels, 20 per cent.	Royalty: Maximum, 12½ per cent.
If lessor elects to take oil, storage shall be provided for 30 days.	Lessor cannot elect.
Government has right to purchase oil produced at posted price.	Lessor has no option to purchase. Oil brings premium.
Secretary may suspend drilling. (This was done recently.)	Lessor cannot suspend drilling.
Lessee pays $100.00 for each location on cultivated lands.	No such requirements.

GLENN T. BRADEN, OSAGE LEASE	PRODUCERS, 88
13 Buildings and permanent improvements in certain cases go with land and can not be removed.	Lessee may remove all improvements.
Gas lessees may drill.	Gas goes with oil rights.
Cannot drill through gas sand without consent of inspector.	No restriction on drilling through gas sand.
Casinghead gas manufactured into gasoline provides 16⅔ per cent royalty.	Maximum royalty 12½ per cent.
Subject to present and future regulations of Interior Department.	Interior Department has no control.
Violation of any of the terms of the lease subjects lessee to a fine of $500 per day for every day terms or regulations are violated.	No penalty provided.
Bond required.	No bond required.
Assignment not valid unless approved.	Assignable at will.

11. The said Glenn T. Braden was induced to pay said ex-
14 cessive royalty and to assume the additional burdens and obligations imposed upon him by the terms of said lease in and because of the belief and understanding on his part that the income derived from said lease could not and would not be burdened with any form of governmental tax; in the operation of said lease the said Glenn T. Braden acted as agent or instrument of the Government and was entitled to all of the rights, privileges, and immunities to which the Osage Tribe of Indians were and are entitled, including the right to enjoy the proceeds from the production of oil from said lease without the imposition of an income tax or a governmental tax in any form; and for the United States to lay, or undertake to lay, a tax or assert the power to tax the income of its own lessee from his sale of his share of such oil produced by him from said lands would be to lay a tax upon the Indians in respect of their said lands.

VI

12. As shown by the above quoted provisions of the act of June 28th, 1906, the oil, gas, coal, and other minerals underlying all lands in the Osage Nation were reserved to the use of the tribe or nation for a period of twenty-five years, and as shown by the above quoted provisions of the act of March 3, 1921, this reservation was continued until the 7th day of April, 1946; by said acts of Congress all leases for oil, gas, coal, and other minerals underlying any of the lands in the Osage Nation, including the land covered by the lease from which the income of the said Glenn T. Braden was derived, could
15 only be leased by the Osage Tribe of Indians through its tribal council and with the approval of the Secretary of the Interior,

and under such rules and regulations as he should prescribe; and said Osage lease hereinbefore described was thus made so that the royalties to be paid to said tribe or nation for the oil produced from said lease were and are required to be paid into the Treasury of the United States to be paid out in the manner prescribed by law and in accordance with the rules and regulations of the Department of the Interior.

13. The United States has, by virtue of the relation hereinbefore set out, exercised absolute and complete dominion and control as guardian over the said Osage Nation, and particularly the oil deposits underlying all lands in said nation, including the land hereinabove described, and is holding the same in trust for the use and benefit of said Indians.

14. Under the Constitution and laws of the United States the said Osage Tribe of Indians are under the sole and exclusive jurisdiction of the United States of America; under said Constitution, laws, and treaties the United States of America has assumed the obligation, and it became and is its duty to properly administer said trust and protect the lands of said tribe against any and all forms of alienation and incumbrance, including any taxation thereof; it obligated itself and it became and is its duty to develop the oil deposits underlying said lands for the use and benefit of its wards, the members of said tribe; the said Glenn T. Braden was, during all of the years
16 from 1917 to 1921, inclusive, operating and developing the oil lease covering the tract of land hereinabove described, as the agent or instrumentality of the Government of the United States and as agent or instrumentality of said tribe or nation of Indians, the members or citizens thereof, and as a means employed by the Congress of the United States, acting through the Secretary of the Interior, to carry into effect the powers conferred by, as well as the mandates of the Constitution of the United States, and the various treaties and acts of Congress; and acting in said capacity, the said Glenn T. Braden was, during all of said years, exercising the privileges, licenses, and franchises to him so granted by said United States as such agent, instrumentality, and means.

15. Any tax imposed upon the income derived from said lease developed and operated by the said Glenn T. Braden, pursuant to the acts of Congress aforesaid, and under the direction, control, and dominion of the United States, is a tax upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States and the obligation resting upon it by the various treaties with the Osage Tribe of Indians, and is a tax upon a privilege or occupation and exacted from an instrumentality of the United States, and is a tax upon a license or franchise granted by the said United States and exercised by said taxpayer under and by virtue of the Constitution and laws of the United States, and is a tax upon an
17 agent of the United States and his occupation as such, and is a tax upon the income from property which is exempt by

reason of the Constitution and laws of the United States and the various treaties with said tribe of Indians, and is a tax substantially and in effect upon the lease and property from which said income is derived, and upon the powers and operations of the Government of the United States, and a tax upon the property held in trust by the United States for its said Indian wards, and would be and is destructive of the power of the Government to make suitable and proper contracts for the development of the oil deposits belonging to its Indian wards, and would be, and is adding burdens additional to those set out in the contract made to and with the said Glenn T. Braden under governmental supervision, prior to the attempted imposition of such tax, and would be and is destroying the very governmental agency through which the United States is performing its duty and carrying out its contractual obligation to and with its said wards.

VII

16. Upon the threat of the defendant to enforce the payment of such tax, together with penalties and interest as provided by law, by destraint and sale of property, and solely to avoid the imposition of penalties and interest, and under compulsion, duress, and coercion, the said Glenn T. Braden and the plaintiff paid to the defendant, as such collector for the years 1917 to 1920, inclusive, taxes upon income received from said Glenn T. Braden's sale of his share of the oil produced by him as such lessee from said restricted
18 Indian lease; a detailed statement of which is hereinafter more fully pleaded, and all of which taxes were illegally and wrongfully exacted and collected and received by the defendant.

VIII

17. Pursuant to the provisions of an act of Congress, entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3rd, 1917, Glenn T. Braden executed and filed with the collector of internal revenue for the twenty-third district of Pennsylvania his income-tax return for the taxable year of 1917; said return so filed with the collector is, by reference thereto, made a part hereof as fully as though copied in full herein; and there was so received by him during said year and reported in his said income-tax return the sum of $116,412.52, which was received from the sale of oil produced from the land hereinabove described.

By the inclusion of said income derived from the operation of said restricted Osage Indian lease the tax liability of the said Glenn T. Braden was increased by the sum of $62,862.76; the said sum was levied and assessed against the said Glenn T. Braden over his due objection and was paid by the plaintiff under due protest on the 17th day of May, 1924; and having paid said sum under protest and having objected to the assessment being made upon the ground that

same was an illegal tax, for in that it represented a tax upon income derived from the operation of restricted Osage Indian
19 leases, plaintiff thereafter, and on the 4th day of June, 1924, filed with the defendant herein, at his office in the city of Pittsburgh, State of Pennsylvania, its duly signed and sworn to claim for refund of said sum of $62,862.76; a copy of which claim for refund (without the signature) is hereto attached, marked Exhibit "A" and made a part hereof.

18. In the manner above set forth there was assessed (over and beyond a tax paid to a prior collector) against this plaintiff for the taxable year 1918 an additional tax of $20,574.05; said tax was paid under due protest on the 17th day of May, 1924; thereafter and on the 4th day of June, 1924, the plaintiff filed with the defendant, at Pittsburgh, Pennsylvania, its duly signed and sworn to claim for refund of the sum of $20,304.05, being that portion of the additional tax so assessed for the year 1918 which was paid upon income derived from restricted Osage tribal lands; a copy of which claim for refund (without the signatures) is hereto attached, marked Exhibit "B" and made a part hereof.

19. Pursuant to the provisions of an act of Congress entitled "An act to provide revenue, and for other purposes," approved February 24th, 1919, the said Glenn T. Braden filed his income-tax return for the taxable year of 1919 with the collector of internal revenue at Pittsburgh, Pennsylvania, and tendered and paid to said collector of internal revenue the sum of $203,124.09, representing the income derived by him from all sources for the year 1919; at the time
20 of paying said original tax the Treasury Department was laboring under the mistaken belief and was requiring, as a result of its erroneous construction of the laws applicable, that income derived from restricted Indian lands be included in the return, and as a result of such arbitrary and erroneous rulings a tax thereupon was required to be paid; and acting and relying upon said arbitrary and erroneous rulings the said Glenn T. Braden included in said return all income derived by him from the oil lease hereinabove described.

Subsequent to the assessment and payment (to a former collector) of said sum of $203,124.09, there was levied and assessed against the said Glenn T. Braden, over the due protest of the plaintiff, the further sum of $92,093.75 for the said year 1919, which additional assessment was paid under due protest on May 29, 1924; and of said total sum of $295,217.84 levied, assessed, and collected for the year 1919 the sum of $220,650.76, including said $92,093.75 paid the defendant, represented the tax so illegally levied, assessed, and collected, for the reason that same was levied, assessed, and collected upon income derived from said restricted Indian lease.

After the payment of said tax, and on the 4th day of June, 1924, the plaintiff filed with the defendant herein, at Pittsburgh, Pennsylvania, its duly signed and sworn to claim for a refund of said

taxes so illegally levied, assessed, and collected in the sum of $220,650.76, a copy of which claim for refund (without signatures) is hereto attached, marked Exhibit "C" and made a part hereof.

21 20. Pursuant to the provisions of an act of Congress entitled "An act to provide revenue, and for other purposes," approved February 24th, 1919, the said Glenn T. Braden filed his income-tax return for the taxable year of 1920 with the collector of internal revenue at Pittsburgh, Pennsylvania, and tendered and paid to the collectors of internal revenue the sum of $312,762.51, representing the income derived by him from all sources for the year 1920; at the time of paying said original tax the Treasury Department was laboring under the mistaken belief and was requiring, as a result of its erroneous construction of the laws applicable, that income derived from restricted Indian lands be included in the return and a tax thereupon was required to be paid; and acting and relying upon said arbitrary and erroneous rulings the said Glenn T. Braden included in said return all income derived by him from the oil lease hereinabove described.

Subsequent to the assessment and paying of said sum of $312,762.51 there was levied and assessed against the said Glenn T. Braden, over the due protest of the plaintiff, the further sum of $20,659.86 for the said year of 1920, which additional assessment was paid under protest on May 29th, 1924; and of said total sum of $333,422.37 levied, assessed, and collected for the year 1920 the sum of $331,164.23 represented the tax so illegally levied, assessed, and collected for the reasons that same was levied, assessed, and collected upon income derived from said restricted Indian lease, whereof there was paid as aforesaid by the said Glenn T. Braden to

22 the defendant $156,381.25 (half on September 12, 1921, and half on December 17, 1921), and by plaintiff to the defendant $20,659.86.

After the payment of said tax and on the 4th day of June, 1924, the plaintiff filed with the defendant herein at Pittsburgh, Pennsylvania, its duly signed and sworn to claim for a refund of said taxes so illegally levied, assessed, and collected in the sum of $331,164.23, a copy of which claim for refund (without signatures) is hereto attached, marked Exhibit "D," and made a part hereof.

21. Said protests were in writing and accompanied the aforesaid payments and embodied written notice to the defendant of the intention to bring a suit against the defendant to test the validity of his said claims for said taxes so exacted, collected, and paid as aforesaid.

22. Said claims for refund have all been denied by the Commissioner of Internal Revenue, because, according to the commissioner, there appeared to him to be no basis under the income tax laws for holding the income in question as nontaxable, and no part of said taxes has been refunded, and plaintiff, having complied with all of the provisions of the acts of Congress and the rules and regulations of the Treasury Department as to objections, protests, appeals, and claims for refund, has not been able to recover any part of said

taxes so illegally levied, assessed, exacted, and collected, and is therefore without any recourse except to pursue the remedy given to taxpayers under and by virtue of the acts of Congress, which gives this plaintiff the right to proceed in this court for the
23 recovery of said taxes so wrongfully and illegally levied, assessed, exacted, and collected, which taxes are wholly due and owing to the plaintiff from the defendant, to wit, as follows:

The full sum of $62,862.76 with interest thereon from May 17, 1924.

The full sum of $20,304.05 with interest thereon from May 17, 1924.

The full sum of $92,093.75 with interest thereon from May 29, 1924.

The full sum of $156,381.25 with interest on $78,190.63 from September 12, 1921, and on $78,190.62 from December 17, 1921.

The full sum of $20,659.86 with interest thereon from May 29, 1924.

Wherefore plaintiff brings this action.

ALLEN & UNDERWOOD.
STERRETT & ACHESON,
Attorneys for Plaintiff.

[*Duly sworn to by John W. Chalfant. Jurat omitted in printing.*]

24 In United States District Court

Note re exhibits

(Attached to statement of claim are four exhibits, identified as A, B, C, and D, which are in due form and duly support the allegations with respect to said exhibits in the statement of claim, but the details thereof not being material to the questions before the Court of Appeals or considered relevant thereto the exhibits are not printed.)

In United States District Court

Amendment to statement of claim

Agreeably to the rule of court, the Colonial Trust Company, executor of the will of Glenn T. Braden, deceased, the plaintiff hereby amends and supplements its statement of claim as follows:

25 By changing Subdivision VII, 16, by substituting "1921" for "1920" where the latter appears in said subdivision.

By adding a paragraph numbered 20½ after paragraph 20 and before paragraph 21, as follows:

20½. Pursuant to the provisions of an act of Congress entitled "An act to reduce and equalize taxation, to provide revenue, and for other purposes," approved November 23, 1921, the said Glenn T. Braden

filed his income-tax return for the taxable year of 1921 with the defendant herein. In making said return the said Glenn T. Braden, pursuant to the requirements of the rules, regulations, and decisions of the Treasury Department and in ignorance of his legal rights in the premises, included in his return of income all sums received by him from said oil lease and paid to the defendant a tax upon the same, which amounted to the sum of $689.85, which income would not have been included in said return but for the erroneous construction of the laws as applied by the Treasury Department and the demand by said department that said income be included in the income-tax returns of all individuals operating leases in the Osage Nation.

After said payment of said tax and on the 4th day of June, 1924, the plaintiff filed with the defendant herein at Pittsburgh, Pennsylvania, its duly signed and sworn-to claim for a refund of said tax so illegally collected in said sum of $689.85, a copy of which claim for refund (without the signatures) is hereto attached, marked Exhibit "E" and made a part hereof.

26 By adding to the final paragraph of the statement of claim the claim as wholly due and owing to the plaintiff from the defendant of the full sum of $689.85 with interest thereon from March 15, 1922.

The foregoing averments are made with the same force and effect as if contained as above and at the above places in the statement of claim as originally filed.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff.

[*Duly sworn to by John W. Chalfant. Jurat omitted in printing.*]

27 In United States District Court

Note re exhibit

(Attached to amended statement of claim is Exhibit E, which is in due form and duly supports the allegation with respect to said exhibit in the statement of claim, but the details thereof not being material to the questions before the Court of Appeals or considered relevant thereto the exhibit is not printed.)

In United States District Court

Affidavit of defense

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

D. B. Heiner, collector of internal revenue for the twenty-third district of Pennsylvania, defendant above named, being duly sworn according to law, deposes and says that he is fully acquainted with

the facts herein set forth, and that he is advised and so avers that the statement of claim filed by the plaintiff in the above entitled case is insufficient in law for the following reasons:

1. That it does not aver facts sufficient to constitute a cause of action.

2. That the income which was the subject of the tax sought to be recovered in this suit was not exempt from said tax under the provisions of the revenue acts of 1916, 1917, 1918, and 1921.

3. That the income which was the subject of the tax sought
28 to be recovered in this suit was not exempt from said tax by reason of any provisions of law, treaty, or governmental policy relating to the Osage Tribe of Indians, or because of any relationship, duty, obligation, or right arising out of the guardianship of the United States over the funds and property of the Osage Tribe of Indians.

4. That the alleged fact that the mineral lands belonging to the Osage Tribe of Indians described in the statement of claim were restricted as to alienation in the hands of said tribe and were subject to the supervision and control of the United States under acts of Congress, treaties with the said Osage Tribe, and governmental policies relating thereto did not, as a matter of law, make the income derived by Glenn T. Braden from the sale of oil and gas produced therefrom and owned by him exempt from the tax collected on such income and here sought to be recovered.

5. That the income which was the subject of the tax sought to be recovered in this suit was not exempt from said tax by reason of the existence of any right to such exemption in the said Glenn T. Braden, the recipient thereof, accruing to him by virtue of his status as lessee under the oil and gas lease described in the statement of claim and in the amendment thereto (stipulation paragraph 3), nor was such income exempt from said tax because of any rights, privileges, duties, or obligations accruing to or assumed by the said Glenn T. Braden as such lessee, nor was such income exempt because of the existence of any peculiar relationship between the said
29 Glenn T. Braden and the United States or the Osage Tribe of Indians arising out of said lease or the laws, treaties, rules, and regulations applicable thereto, and assumed by the said Glenn T. Braden thereunder.

Defendant, therefore, respectfully requests the court to hear and dispose of the questions of law so raised in accordance with the provisions of section 20 of the practice act of 1915.

D. B. HEINER.

Sworn to and subscribed before me this 27th day of June, A. D. 1925.

[SEAL.]

GERTRUDE HORTON,
Dep. Clerk, U. S. Dist. A.

In United States District Court

Defendant's motion to strike

And now, on this 27th day of June, 1925, D. B. Heiner, the above-named defendant, by Walter Lyon, United States Attorney for the Western District of Pennsylvania, moves the court to grant a rule on the Colonial Trust Company, executor of the will of Glenn T. Braden, deceased, plaintiff, to show cause why the statement of claim in the above-entitled case should not be stricken off, and in support of said motion assigns the following reasons:

1. That paragraph 10 of said statement of claim, beginning with the words "that in addition thereto certain other obligations were assumed by the said Glenn T. Braden," etc., down to the end of said paragraph 10, avers alleged facts which are wholly immaterial to any issues in this case.

30 2. That paragraph 11 of said statement of claim as interpreted by paragraph 4 of the stipulation herein filed avers alleged facts which are wholly immaterial, are deductions and inferences of the pleader, and also makes averments which are conclusions and inferences of law.

3. That paragraph 14 of the said statement of claim consists entirely of conclusions and inferences of law and is argumentative.

4. That paragraph 15 of said statement of claim consists entirely of conclusions and inferences of law and is argumentative.

WALTER LYON,
Per W. P. M.,
United States Attorney.

In United States District Court

Agreement re motions to strike

December 7, 1925, it is agreed that in so far as the court may conclude that the motions to strike out are well founded, the portions of the statements of claim so adjudged validly basis for the motions shall thereby be deemed automatically to have been amended out of the statements of claim respectively.

STERRETT & ACHESON,
ALLEN & UNDERWOOD,
Attorneys for Plaintiffs.
W. J. AIKEN,
Attorney for Defendants.

31 In United States District Court

Stipulation re amendments, etc.

The plaintiff and the defendant, recognizing that the facts in the above case are not in dispute and that the fundamental questions are of law, in order to facilitate the due presentation of those questions to the court, hereby mutually stipulate of record as follows:

1. Paragraph 5 of the plaintiff's statement of claim is and shall be treated as amended by striking out the words "or tax" in the fourth line of page 4 and by striking out the portion of said paragraph commencing "the United States, while empowered to administer the estate," etc., to the end of the paragraph.

2. Paragraph 6 of the statement of claim shall be amended so that the portion thereof before the quotation of the act of Congress therein mentioned shall read as follows:

"The Osage allotment act of June 28, 1906 (34 Stat. 539), which is also a special act, authorized the allotment of the lands in the Osage Nation to the members thereof in severalty, but specifically reserved from allotment all of the oil, gas, and other minerals underlying the lands embraced in what is known as the Osage Nation, of which the hereinafter-mentioned lease, owned by said Glenn T. Braden, was and is a part, as shown by the following provision of said act."

3. Paragraph 8 is and shall be regarded as amended to read as follows:

"Pursuant to said acts of Congress and the rules and regu-
32 lations of the Department of the Interior promulgated there-
under, large portions of the Osage Nation mineral lands have been leased to individual oil operators and oil companies; among other acquiring an interest in said Osage Nation or Tribe of Indians' lands, as oil lessee, by approval of the Secretary of the Interior, was Glenn T. Braden, who prior to the year 1917 acquired an undivided three-fourths (¾) interest in the north half (N/2) of section 12, township 20 north, range 8 east, in Osage County, Oklahoma, a copy of which rules and regulations, containing the form of lease identical with the said lease owned and held by Glenn T. Braden, is hereto attached and marked "Exhibit 1" and hereby made a part hereof.

4. It is not averred or meant to be averred in the 10th and 11th paragraphs of the plaintiff's statement of claim that any agreement was made or inducement offered to the said Glenn T. Braden to enter into said lease or that the matter of the taxability of his income therefrom was in any wise mentioned or discussed, but that the use of these and like terms contained in these two paragraphs are deductions of the pleader drawn solely from the language of the terms of the lease, acts of Congress, and rules and regulations of the Department of the Interior set forth in the statement of claim and in the exhibits attached hereto.

The defendant contends that the matters set up in said paragraphs, in so far as matters of fact, are immaterial.

33 The defendant further contends that the balance of said two paragraphs are matters of law, which are denied by the defendant.

It is agreed that the defendant's said objections to the entire paragraphs 10 and 11 shall amount to a motion to strike said paragraphs from the statement of claim, the defendant reserving the right to file a more formal motion with further reasons.

5. Paragraph 12 of the statement of claim is, and shall be, regarded as amended by changing the words "so that" in the 6th line from the end of the paragraph to read "and."

6. Paragraph 13 of the statement of claim is, and shall be, regarded as amended by adding thereto the following: "Except that oil, gas, and mineral leases made pursuant to said acts of Congress are required to be executed by the tribal council, but have no validity and are inoperative unless and until approved by the Secretary of the Interior."

7. Paragraphs 14 and 15 embrace contentions made herein by the plaintiff and are matters of law which the defendant denies, the defendant reserving the right to file a formal motion to strike out the same, with supporting reasons.

8. It is stipulated that the averments of fact contained in paragraphs 1, 2, and 3 of plaintiff's statement of claim are true, and that the averments of paragraphs 16 to 21, inclusive, and of paragraph 20½ of plaintiff's amendment to statement of claim filed

34 herein on May 11, 1925, in so far as they state facts relating to the filing of returns by Glenn T. Braden with the defendant collector of internal revenue at Pittsburgh, Pennsylvania, the payment by Glenn T. Braden of taxes shown to be due by such returns, the assessment, collection, payment by Glenn T. Braden, and the receipt by the defendant of such taxes and of additional taxes levied or assessed by the Commissioner of Internal Revenue, payment under protest, the filing of claims for refund, the execution of waivers, and the denial or rejection of such claims for refund are true. All averments contained in said paragraphs 16 to 21, inclusive, which are to the effect that the taxes assessed and collected and sought to be recovered in this suit were illegally, wrongfully, or erroneously assessed, levied, and collected, and all averments to the effect that the rulings of the Secretary of the Treasury or the Commissioner of Internal Revenue requiring such taxes to be paid were erroneous, illegal, mistaken, arbitrary, or otherwise unlawful, are denied by the defendant. The defendant admits that no part of the tax sought to be recovered has been refunded to the plaintiff, but denies that the sums alleged to be due the plaintiff in paragraph 21 of plaintiff's statement of claim and in paragraph 20½ of said amendment

thereto, or any other sum, is due and owing to the plaintiff from the defendant.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff.
WALTER LYON,
Attorney for Defendant.

35 *Exhibit 1 to stipulation*

Regulations to govern the leasing of lands in the Osage Reservation, Okla., for oil and gas mining purposes. Approved August 26, 1915

Section 3 of the act approved June 28, 1906 (34 Stat. L. 539–543), provides:

That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selection and division of land herein provided for, may be made by the Osage Tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, That the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of the United States: And provided further, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided
36 for without the written consent of the Secretary of the Interior: Provided, however, That nothing herein contained shall be construed as affecting any valid existing lease or contract.

To carry this provision of law into effect, the following forms and regulations are prescribed to govern the leasing of such lands for oil and gas mining:

DEFINITIONS

The following expressions wherever used in the lease and regulations shall have the meaning now designated, viz:

Superintendent: The superintendent of the Osage Agency, Pawhuska, Okla., in charge of the Osage Agency and Reservation, or any other person who may be in charge of such agency and reservation, and it shall be his duty to enforce compliance with these regulations.

Inspector: Any person appointed as inspector of oil and gas wells, or who may be designated by the Secretary of the Interior or the Commissioner of Indian Affairs to supervise oil or gas operations on Osage lands under the direction of the superintendent.

Foster lease: That contract made on March 16, 1896, between the Osage Tribe of Indians and Edwin B. Foster, and extended by the act of March 3, 1905 (33 Stat. L. 1061), as to approximately 680,000 acres.

Sublessee: Any person, firm, or corporation which has any leasehold interest in Osage oil and gas lands acquired under the Foster lease.

37 Sublease: Any land or any leasehold interest in any land acquired under the Foster lease.

Oil lessee: Any person, firm, or corporation to whom an oil mining lease is made under these regulations.

Gas lessee: Any person, firm, or corporation to whom a gas lease is made under these regulations.

Arbitration: Each of the parties to the controversy, dispute, or matter to be adjusted shall designate one representative, and the representatives so designated shall immediately together appoint a third person, and on failure to agree, within five days upon a third person, the superintendent may designate same. These three shall constitute a board of arbitration, and the action of such board shall be final and conclusive between the parties. The expense of arbitration in any case shall be divided between the parties in interest in equal proportions.

Casing-head gas: The gas coming through the casing when the well is equipped for pumping oil.

SPECIFIC PROVISIONS RELATING TO NEW LEASES OF LANDS COVERED BY THE FOSTER LEASE

1. Each and every person, firm, partnership, joint-stock association, corporation, and each and every combination of person
38 and corporation, partnership and corporation, or corporation and corporation holding subleases and assignments under the Foster lease approved by the Secretary of the Interior, shall be considered and treated as a distinct and separate entity independent of his or their affiliations with any other sublessee. No assignment or sublease made subsequent to July 1, 1915, will be approved.

2. Any such sublessee who in good faith shall have made an effort prior to October 1, 1915, to develop any lands under the Foster lease for oil, and shall have drilled one or more wells thereon, even though such wells may have resulted in dry holes, will be granted a new oil lease on the expiration of the Foster lease on March 16, 1916, under the conditions set forth in sections 3 to 9 of these regulations, provided acceptance of the resolution of the tribal council dated June 17, 1915, is filed with the superintendent not later than September 1, 1915.

3. Any such sublessee may select from his present holdings and obtain an oil lease embracing not to exceed 4,800 acres of land in quarter-section units according to the public survey, or in fractional parts of such units where the present sublease does not cover a full

quarter section, except such quarter section or fractional quarter-section units the producing wells of which were capable of averaging 25 or more barrels of oil per day on July 1, 1915, which units shall be released to the Osage Tribe on March 16, 1916, together with all other producing and nonproducing properties held by each such sublessee in excess of 4,800 acres.

39 4. All units on which there are producing oil wells released to the Osage Tribe shall be offered for lease to the highest bidder at public auction not later than February 15, 1916, the purchaser to take possession on March 17, 1916. Any sublessee releasing producing units to the tribe shall be permitted to bid for such units at the sale, and any such properties acquired shall not be considered a part of his 4,800 acres. The terms, conditions, and rules under which the public sale shall be conducted shall be stated in the advertisements.

5. Should a sublessee, in expectation of becoming a purchaser at the public auction, not have selected from his present holdings the full area of oil lands on which he might be granted a lease under section 3 hereof, and it develops that such sublessee is unable to acquire the units which he had expected to purchase at the public sale, he may on or before March 1, 1916, select other lands within his sublease, so as to obtain the full benefits of section 3 of these regulations: Provided, That the sublessee, at the time he submits the plat of lands on which he seeks to acquire a new lease as provided in section 9, shall give notice of his intention to take advantage of the benefits of this section.

6. An appraisement shall be made under the direction of the Secretary of the Interior of each quarter section and fractional quarter section unit the producing wells of which were capable of averaging 25 or more barrels per day on July 1, 1915, to be released to the Osage Tribe, together with the equipment on

40 all producing units released to the tribe, including the casings in the wells. Should the sublessee be unwilling to accept the appraisement of the equipment as made he shall have 30 days after March 16, 1916, within which to remove any engines, derricks, tools, and machinery, but in no case shall the casings in any producing wells be removed, and the value of such casings shall be determined by arbitration and the sublessee shall be reimbursed by the purchaser. The appraised value of the equipment shall be published and no bid will be accepted less than such appraisement. The successful bidder shall pay the sublessee for the equipment, and the bonus for the land shall be paid to the superintendent.

7. In the event that no acceptable offer is received at the public sale for any producing oil unit, the sublessee shall be permitted to continue the development and operation of such unit and to have a lease on the same, and such acreage shall not be considered as a part of the 4,800 acres which he is entitled to hold under these regulations.

8. Gas leases shall be made by the tribal council to the present gas lessees covering all or part of their present holdings and for such periods as the Secretary of the Interior may determine: Provided, That applications made prior to June 17, 1915, for leases of gas may be granted in the discretion of the Secretary of the Interior.

9. Each oil and gas sublessee shall furnish the superintend-
41 ent on or before November 1, 1915, with a plat showing legal subdivisions of the lands upon which he desires a new lease, together with an itemized statement showing first cost and present value of all surface equipment on each producing quarter section or fractional quarter section to be released to the Osage Tribe which he desires to have appraised and sold with the property.

Applicants for gas leases shall file a certified plat indicating the lands desired, showing the location and ownership of gas wells, together with all gas-pipe lines and any other related equipment, with a statement of any indebtedness covering any improvements and equipment within the area applied for.

10. All contracts for the sale of gas for industrial purposes and sworn statements showing terms, conditions, and schedule of prices contained in contracts with domestic consumers shall be subject to the approval of the Secretary of the Interior, and shall be filed with the superintendent, who shall forward them without recommendation to the Secretary of the Interior through the Commissioner of Indian Affairs. Before any such contract or schedule is approved the superintendent shall be notified of the terms upon which the Secretary of the Interior will approve the same, and he will thereupon notify the principal chief, who shall convene the tribal council and inform the members of the terms of the proposed contract.

The tribal council may within 10 days from receipt of such
42 notice by the superintendent communicate to the Secretary of the Interior, through the superintendent and the Commissioner of Indian Affairs, their views with reference to any proposed contract.

In the sale and disposition of gas preference shall at all times be given to domestic consumers. All contracts for the industrial use of gas shall contain a clause to the effect that when it is shown to the satisfaction of the Secretary of the Interior that such gas is needed by domestic consumers within an area fixed by the Secretary of the Interior, such contract shall terminate upon the expiration of 30 days' notice from the Secretary of the Interior, and that the superintendent shall have authority to immediately suspend the furnishing of gas to industrial consumers when he is of opinion that such gas is needed for domestic consumers. All gas furnished to industrial and domestic consumers shall be metered and sold at meter rates: Provided, That gas furnished to an oil lessee may be sold as provided in the gas lessee's contract.

All contracts with domestic consumers shall be subject to the inspection of the superintendent.

(Form B)

OIL MINING LEASE, OSAGE RESERVATION, OKLAHOMA

This lease, made and entered into in quadruplicate on this _____ day of _____, A. D. 19__, by and between the Osage Tribe of Indians in Oklahoma, by _____, principal chief, under authority of the resolution of the Osage tribal council,
43 dated June 17, 1915, party of the first part, designated as lessor, and _____, of _____, party of the second part, designated as lessee, under and in pursuance of section 3 of the act approved June 28, 1906 (34 Stat. L. 539–543), witnesseth:

1. The lessor, in consideration of $1, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions herein contained, and hereby agreed to be paid, observed and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for five years from the date of approval hereof, and as long thereafter as oil is found in paying quantities, provided that the term of this lease shall not extend beyond the date the title to the minerals remains in the Osage Tribe, all the oil deposits in or under lands described as follows, to wit:

_____ Sec. _____, T. _____ N., R. _____ E.,
_____ Sec. _____, T. _____ N., R. _____ E.,

of the Indian meridian, and containing _____ acres, more or less, with the exclusive right to extract, pipe, store, and remove oil.

2. The lessee agrees to pay or cause to be paid to the superintendent of the Osage Indian Agency, at Pawhuska, Okla., for the lessor, as royalty, the sum of 16⅔ per cent of the gross proceeds from sales after deducting the oil used for fuel in operating the lease, unless the Osage tribal council, with the approval of the Secretary of the Interior, shall elect to take the royalty in oil, payment to be made at time of sale or removal of the oil, except where payments are made on division orders, and settlement shall
44 be based on the actual selling price, but at not less than the highest posted market price in the Mid-Continent oil field on the day of sale or removal: Provided, That when the quantity of oil taken from all the producing wells on any quarter section according to the public survey, or fractional part of a quarter section if the land covered by this lease does not include the full quarter section, during any calendar month, is sufficient to average 100 or more barrels per well per day, the royalty on such oil shall be 20 per cent.

Should the lessor, with the approval of the Secretary of the Interior, elect to take the royalty in oil, the lessee shall furnish free storage for the royalty oil for not exceeding 30 days.

Any of the executive departments of the United States Government shall have the option to purchase at the highest posted market price on the day of sale all or any part of the oil produced under this lease.

3. Lessees shall drill at least one well to the Mississippi lime, unless oil or gas is found in commercial quantities at a lesser depth, on each and every quarter section or fractional quarter section of land covered by this lease which is not producing oil on March 16, 1916, within one year from the date of approval hereof, or shall pay to the superintendent, for the lessor, rental of $1 per acre, payable annually, for each year or fractional part of a year the land is held by the lessee and a well is not drilled: Provided, That the
45 time within which a well shall be drilled or rental paid in lieu of drilling shall not begin to run on any homestead selection until the consent of the Secretary of the Interior to drilling on such homestead shall have been given. Should the lessee elect to surrender any such quarter section or fractional quarter section before the end of any such yearly period without drilling a well thereon, he shall pay the rental of $1 per acre for the fractional part of a year the land is held and a well is not drilled, and failure of the lessee to pay such rental within 25 days from the expiration of any yearly period during which such well is not drilled shall be cause for the cancellation of this lease by the Secretary of the Interior, but such cancellation shall not release the lessee and his sureties from the obligation to pay such rental: Provided, That the lessee may surrender this lease and have the same cancelled at any time as to any homestead selection should the Secretary of the Interior refuse to give his consent to drilling thereon: Provided further, That whenever the Secretary of the Interior shall consider the marketing facilities inadequate to take care of the production he may direct the suspension of drilling operations on all producing lands.

4. Lessee shall have the right to use so much of the surface of the land and such water on the premises as may be necessary for operations, including the right to lay and maintain pipe lines, telephone and telegraph lines, pull rods, and other appliances necessary for the operation of the wells; also the right of ingress and egress and the rights of way to any point of operations under condition
46 of least injury and inconvenience to the owner and occupant of the surface. Before commencing operations the lessee shall pay to the surface owner the sum of $100 for each well located on cultivated land or land suitable for cultivation and $35 for each location on land not susceptible to cultivation. Location sites shall not exceed 1½ acres in area. Lessee shall also pay $10 for each site outside of the well location used for oil tank of not exceeding 1,600 barrels' capacity, allowing 50 feet square for each tank site. The sum to be paid for an oil-tank site of larger capacity and occupying a greater area shall be as agreed upon between the surface owner and the lessee, and on failure to agree the same shall be fixed by arbitration. During operations the lessee shall pay all damages for the use of the surface other than that included in the location and tank sites, all damages to any growing crops or to any improvements on the lands, and all other damages as may be occasioned by reason of

operations. Such damages shall be apportioned among the parties interested in the surface, whether as owner, lessee, or otherwise, as the parties may mutually agree or as their interests may appear. If the parties are unable to agree concerning damages, the same shall be determined by arbitration.

All agreements (or authenticated copies thereof) providing for the settlement of damages shall be filed in the Osage agency if the surface owner is a restricted Indian, and all such amounts which may be due and payable to any such Indian shall be paid to
47 the superintendent and by him immediately remitted to the Indian entitled thereto. All sums due as royalty or damages shall be a lien on all equipment and unsold oil or leased premises.

5. The lessee shall carry on operations in a workmanlike manner, commit no waste, and suffer none to be committed upon the land, nor permit any nuisance to be maintained on the premises under his control, nor allow any intoxicating liquors to be introduced, brought upon, sold, or given away for any purposes on such premises; also keep an accurate account of all operatiions, receipts, and disbursements, furnishing sworn reports of such when and as required by the regulations or by an authorized representative of the Secretary of the Interior.

All buildings and permanent improvements, including casings of all producing wells drilled three years or more prior to the expiration of the lease, shall remain a part of said land and become the property of the surface owner at expiration of the lease, excepting tools, tanks, boiler houses, pipe lines, pumping and drilling outfits, derricks, engines, machinery, and the casings of all dry or nonpaying wells. The casings of wells drilled less than three years prior to and producing oil on the expiration of the lease shall remain the property of the oil lessee: Provided, That such casings shall not be removed from the wells, but shall be purchased from the lessee by the owner of the oil rights at such price as may be mutually agreed upon, and on failure to agree the price shall be fixed by arbitration.

48 6. The lessee accepts this lease with the understanding that the lands covered thereby may be leased to some other party, who shall have the exclusive right to all gas except as herein provided.

7. If the oil lessee shall drill a gas well, he shall, without removing from the well any of the casing or other equipment, immediately shut the well in and notify the gas lessee and the superintendent. In the event the gas lessee does not within 30 days after receiving notice elect to take over such well and reimburse the oil lessee the cost of drilling the same, including all damages paid, in addition to the cost in place of casing, tubing, and other equipment, the oil lessee shall immediately confine the gas to the original stratum, and the disposition of such well shall be subject to the approval of the superintendent.

8. If the gas lessee shall drill an oil well upon the lands described herein, he shall immediately, without removing from the well any of the casing or other equipment, notify the oil lessee and the superintendent. In the event the oil lessee does not within 30 days after receipt of notice elect to take over such well, he shall immediately so notify the gas lessee, and the disposition of such well shall be subject to the approval of the superintendent. Should the oil lessee elect to take over the well, he shall pay the gas lessee the cost of drilling the same, including all damages paid, in addition to the cost in place of casing and other equipment.

9. If the oil lessee shall drill a well which produces both oil
49 and gas in commercial quantities from the same sand, he shall immediately notify the gas lessee, and together they shall arrange for the separation and utilization of the oil and gas and the cost pertaining to said well.

10. Whenever oil and gas are found in separate sands and the oil lessee desires to drill through the gas sand for the oil, he may do so, provided the method of protecting the gas sand shall be approved by the inspector.

11. If at any time any oil or gas well becomes unprofitable and the oil or gas lessee desires to deepen the same, such action as may be mutually agreed upon may be taken not in conflict with the regulations. Upon failure to agree the disposition of such well shall be subject to the approval of the superintendent.

12. All casing-head gas shall belong to the oil lessee, and when used for the manufacture of gasoline shall be metered and be subject to a royalty of 16⅔ per cent, based on the market value of the gasoline contents, and all such gas not utilized by the oil lessee on his leased premises or for operating other adjoining leases within the Osage Reservation shall belong to the gas lessee, subject to the prescribed royalty of 16⅔ per cent.

13. The gas lessee shall furnish the oil lessee, free of royalty, sufficient gas for drilling and operating purposes at a rate to be agreed upon, or on failure to agree the rate shall be fixed by arbitra-
50 tion: Provided, That the oil lessee shall make necessary connections between the well and the meter whenever possible.

14. The oil lessee may at any time by paying to the superintendent all amounts then due, including rentals in lieu of development as provided in paragraph numbered three hereof, and the further sum of $1, surrender all or any quarter section or fractional part of quarter section where the lease does not cover the full quarter section, and have the lease cancelled as to the lands surrendered and be relieved from all further obligations and liabilities thereunder as to the part surrendered: Provided, That if this lease has been recorded lessee shall execute a release and record the same in the proper office.

15. All amounts due and payable under this lease shall be paid to the superintendent in St. Louis or Kansas City exchange, except that, where such exchange can not be procured, post office or express money orders will be accepted.

16. This lease is subject to the regulations now or hereafter prescribed by the Secretary of the Interior relative to such leases, all of which are made a part of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage unless agreed to by both parties.

17. Violation of any of the terms or conditions of this lease
51 or of the regulations pertaining thereto shall subject the lease to cancellation by the Secretary of the Interior, or the lessee to a fine of not exceeding $500 per day for each and every day the terms of the lease or of the regulations are violated, or the orders of the superintendent in reference thereto are not complied with, or to both such fine and cancellation in the discretion of the Secretary of the Interior: Provided, That the lessee shall be entitled to notice and hearing with respect to the terms of the lease or of the regulations violated, which hearing shall be held by the superintendent, whose finding shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the superintendent's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

18. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian Office.

19. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior and not otherwise.

20. Each and every clause and covenant of this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

52 In witness whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

---------- [SEAL].

Attest: ----------

Two witnesses to execution by lessor:

P. O. ----------

P. O. ----------

---------- [SEAL].

Attest: ----------

Two witnesses to execution by lessees:

Post office, ----------

Post office, ----------

ACKNOWLEDGMENT OF PRINCIPAL CHIEF

STATE OF _____
County of _____, *ss:*

Before me, _____, on this _____ day of _____, 19__, personally appeared _____, to me known to be the _____ principal chief of the Osage Tribe, and the identical person who executed the within and foregoing lease, and ac-
53 knowledged to me that he executed the same as his voluntary act and deed on behalf of the Osage Tribe and in accordance with the authority given him by the Osage tribal council.

_____,
(*Official title.*)

ACKNOWLEDGMENT OF INDIVIDUAL

STATE OF _____,
County of _____, *ss:*

Before me, a notary public in and for said county and State, on this _____ day of _____, 19__, personally appeared _____, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that _____ executed the same as _____ free and voluntary act and deed for the uses and purposes therein set forth.

_____,
Notary Public.

My commission expires _____.

ACKNOWLEDGMENT OF CORPORATION

STATE OF _____,
County of _____, *ss:*

On this _____ day of _____, A. D. 19__, before me, a _____ within and for the State and county aforesaid,
54 personally appeared _____ and _____ to me personally known, who, beiing by me duly sworn, did each say that _____ is the president and _____ is the _____ secretary of _____, a corporation, and that the seal affixed to the foregoing and annexed instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said _____ and _____ duly acknowledged that they each had in their said official capacities executed the foregoing instrument as the act and deed of the said company for the consideration and purposes therein mentioned and set forth.

Witness my hand and official seal this _____ day _____, 19__.

_____,
_____.

My commission expires _____.

DEPARTMENT OF THE INTERIOR, UNITED STATES INDIAN SERVICE

OSAGE AGENCY,

Pawhuska, Okla., , *19*__.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be ---------- See my report of even date.

----------,

(*Official title.*)

55 OFFICE OF INDIAN AFFAIRS,

Washington, D. C., ----------, *19*__.

Respectfully submitted to the Secretary of the Interior with recommendation that it be ----------

----------,

Commissioner.

WASHINGTON, D. C., ----------, *19*__.

The within lease is ----------

----------,

Secretary of the Interior.

(Form C)

* * * * * * *

ACREAGE

11. After the approval of leases to sublessees as provided in sections 1 to 9, inclusive, of these regulations, no person, firm, partnership, joint stock association, or corporation will be permitted to acquire any interest in Osage lands for oil purposes by lease, assignment, drilling contract, or otherwise in excess of 4,800 acres.

HOW TO ACQUIRE LEASES OF TRIBAL LANDS

12. Should the Osage tribal council or any person or corpo-
56 ration desire to have any particular tract of land offered for lease, written request to that effect should be submitted to the superintendent, who will promptly transmit such request to the Commissioner of Indian Affairs with his recommendation.

At such times as the Secretary of the Interior may direct the superintendent shall publish in such manner as shall be deemed appropriate notices that specific tracts of Osage lands will be offered at public auction for lease to the highest responsible bidder.

The successful bidder must deposit with the superintendent on the day of sale a certified check on a solvent national bank in an amount equal to 20 per cent of the bid, as a guaranty of good faith. The superintendent after each sale shall furnish a list of all successful bidders to the Commissioner of Indian Affairs with the recommendation of the Osage tribal council.

The right is reserved by the Secretary of the Interior to reject any and all bids and to disapprove and reject any lease made on

an accepted bid. Should any lease be disapproved after deposit made by bidder, the deposit shall be immediately returned.

13. Upon being notified of the acceptance of its bid, a corporation shall file a certified copy of articles of incorporation, and evidence showing compliance with local corporation laws if a foreign corporation: *Provided*, That if any such papers have already been filed a statement to that effect may be submitted.

57 A corporation must also file with is first lease and on January 1 of each year and at such other times as may be required by the Secretary of the Interior a list of all officers, directors, and stockholders, with their post-office addresses, and showing the number of shares of capital stock held by each and whether held for themselves or in trust, together with a sworn statement of its proper officer, showing—

(a) The total number of shares of the capital stock actually issued, the number of shares actually sold, and specifically the amount of cash paid into the treasury on the stock sold, or, if paid in property, state kind, quantity, and value of same paid.

(b) Of the stock sold, how much per share remains unpaid and subject to assessment.

(c) How much cash the company has in its treasury and elsewhere, and from what sources it was received.

(d) What property, exclusive of cash, is owned by the company, and its value.

(e) What the total indebtedness of the company is and specifically the nature of its obligations.

At any time individual stockholders may be required to show to the satisfaction of the Secretary of the Interior in what companies or with what persons or firms they are interested in oil or gas mining leases on the Osage Reservation and whether they hold such interests for themselves or in trust.

58 Leases made by corporations shall be accompanied by an affidavit (Form E) showing the authority of its officers to execute leases, bonds, and other papers.

(Form E)

* * * * * * *

14. A successful bidder shall file an application for approval of lease (Form A), giving the information called for therein, and will be allowed 30 days from date of notice of acceptance of bid within which to execute leases and otherwise comply with these regulations. Failure on the part of an applicant to comply with the requirements shall operate as a forfeiture of the amount deposited as a guarantee of good faith. Delivery of lease shall be withheld pending payment of balance of any bonus, and if such balance be not paid within 20 days after notice by the superintendent of the approval of the lease, the approval shall be revoked and the deposit forfeited, in the discretion of the Secretary of the Interior.

(Form A)

APPLICATION FOR APPROVAL OF _____ LEASE, OSAGE RESERVATION

To the SECRETARY OF THE INTERIOR:

_____, of _____, designated as the
59 applicant, hereby applies to have approved the accompanying lease embracing _____ acres of Osage lands, and agrees that this application shall be considered a part of the lease so described.

The applicant solemnly swears that the lease, for which the approval is requested, is taken in good faith in the interest and for the benefit of the applicant, and not for speculation or transfer, or as agent for, or in the interest or for the exclusive benefit of, any other person, corporation, or association; that no other person, corporation, or association has any interest, present or prospective, directly or indirectly, therein, and that there is no understanding or agreement, express or implied, by which the land leased or any interest in or under the lease by working or drilling contract or otherwise, is to be used, sublet, assigned, or transferred without the consent of the Secretary of the Interior first obtained, but that it is taken for the purpose of operation and development under the direction, supervision, and control of the applicant, except as herein stated.

In addition to the leases in the name of the applicant for which approval is requested, the affiant solemnly swears that the applicant is not interested, either directly or indirectly, in _____ mining leases of lands in the Osage Reservation, except with the following-named persons, corporations, or associations, and that the aggregate of all these interests, together with the leases held by the applicant alone is not more than _____ acres:

60 (Names of person, corporation, or association with whom applicant is interested:)

_____

(Post-office address:)

_____

The applicant hereby states that his general business experience for the past five years has been as follows: _____

_____

The applicant's financial condition at this time is _____

_____

It is further stated that the applicant's resources are as follows:

_____

and that he has available at least $_____ for the development of the land covered by said lease.

Where the applicant is a corporation it hereby shows that at this time it has $_____ paid-up capital and $_____ in its treasury available for oil and gas operations.[1]

[1] Corporations shall furnish with their first application the additional financial showing required by the regulations.

It is hereby agreed that on the issue, transfer, or cancellation of stock of corporations or changes in officers prompt reports will be made thereof as required by the regulations.

The books and accounts of the applicant covering the business to be carried on under this lease, if approved, will be kept at _____, in the custody of _____.

61 References:[2]

_____, P. O. _____

_____, P. O. _____

_____, P. O. _____

Executed this _____ day of _____, 191__, at _____ _____

_____

Before me a notary public in and for the county of _____, State of _____, personally appeared _____, who, being first duly sworn according to law, depose__ and say__ that the foregoing application was signed by proper authority and in good faith for the purpose therein stated, and that the statements made therein are true as _____ verily believes__.

[L. S.] _____,

Notary Public.

My commission expires _____.

15. Oil lessees shall furnish with each oil lease, to be filed at the time the lease is presented, a bond upon Form D, with two or more sureties, or with a surety company duly authorized to execute bonds. Such bonds shall be in the sum of $1,000 for each

62 quarter section or fractional quarter-section unit covered by the lease: Provided, however, That the lessee shall be allowed to file one bond, Form G, covering all leases to which he or they are or may become parties, instead of a separate bond in each case, such bond to be the penal sum of $15,000.

Gas lessees are required to furnish with each gas lease a bond of the same character in the sum of $5,000 when the gas lease covers 25,000 acres or less, $15,000 for a lease covering more than 25,000 but not more than 50,000 acres, and $25,000 for a lease covering more than 50,000 acres.

The right is specifically reserved to increase the amount of any such bond above the sum named in any particular case where the Secretary of the Interior deems it proper to do so.

(Form D)

* * * * * * *

(Form G)

* * * * * * *

[2] Bank references are preferred.

16. Any person, other than a lessee or an allottee or the heirs of a deceased allottee, claiming an interest in any leased tract, or in damages thereto, must furnish to the superintendent a statement in writing showing his interest, and failure to furnish such state-
63 ment shall constitute a waiver of notice and estop said person from claiming any part of such damages after the same shall have been disbursed.

17. Lessees and those acting under them shall not conduct operations within or upon any homestead selection without the written consent of the Secretary of the Interior.

If the allottee is unwilling to permit operations on his homestead, the superintendent will direct the inspector to make an examination of the premises with the allottee and the lessee, or his representative, and should the inspector be of the opinion that the interests of the Osage Tribe requires that the particular tract be developed he will endeavor to have the parties agree upon the terms under which operations on the homestead may be conducted.

In the event the allottee and the lessee can not, with the assistance of the inspector, agree on the matter, the allottee shall be permitted to go before the Osage tribal council, and the council, after hearing the allottee, the lessee, and the inspector, shall make such recommendations as it deems proper. Guardians, legal or natural, may represent their Indian wards, and where no one is authorized or where no person is deemed by the superintendent to be a proper party to speak for a minor or person of unsound mind or of feeble understanding, the principal chief of the Osage Tribe shall represent them.

Rental in lieu of development shall not begin to run on any
64 homestead selection until the consent of the Secretary of the Interior to operations on such homestead shall have been given.

18. Each and every lessee and assignee shall, from the date of approval of lease or assignment, maintain an office at Pawhuska, Okla, with an agent upon whom service of process may be had in conformity with the laws of the State of Oklahoma, and who shall have authority to represent and speak for the lessee or assignee in controversies affecting any individual member of the Osage Tribe.

19. Lessee shall comply with all orders or instructions issued by the superintendent or inspector within the time specified, and shall allow the lessor and his agents, or any authorized representative of the Secretary of the Interior, to enter, from time to time, upon and into all parts of the leased premises for the purpose of inspection; and shall further agree to keep a full and correct amount of all operations, receipts, and disbursements and make reports thereof, as herein required, and their books and records, showing manner of operations and persons interested, shall be open at all times for the examination of any authorized representative of the superintendent or of the Secretary of the Interior.

20. Royalties on all oil and gas produced in any month shall be paid on or before the 25th day of the month next succeeding, and the remittances shall be accompanied by sworn reports covering all operations whether there has been production or not. Lessees shall show in this statement the total amount of oil and gas sold, and not merely their working interest, and also the dates of discovery and beginning of utilization of gas from gas wells. The lessee may include in one sworn statement all leases upon which there is no production or upon which dry holes have been drilled.

ASSIGNMENTS

21. Approved leases or any interest therein may be sublet, transferred, or assigned with the consent and approval of the Secretary of the Interior and not otherwise. Subleases, transfers, or assignments, when so approved, shall be subject to the terms and conditions of the original leases and the regulations under which such leases were approved, as well as to such additional requirements as the Secretary of the Interior may prescribe. The sublessee, transferee, or assignee shall furnish with his sublease, transfer, or assignment a satisfactory bond as hereinbefore prescribed in connection with leases.

Any attempt to sublease, transfer, or assign an approved lease or any interest therein without the consent and approval of the Secretary of the Interior shall be absolutely void and shall subject the original lease to cancellation in the discretion of such Secretary.

(Form F)

* * * * * * *

22. Wherever notice is provided for in these regulations, unless otherwise specifically stated, it shall be sufficient if notice has been mailed to the last-known place of address of the party, and time shall begin to run from the day next ensuing after the mailing or from the date of delivery of personal notice; but where the party is outside the State of Oklahoma the superintendent may, in his discretion, increase the time allowed.

OPERATIONS

23. No operations shall be permitted upon any tract of land until a lease covering such tract shall have been approved by the Secretary of the Interior.

POWERS AND DUTIES OF INSPECTORS

It shall be the duty of the inspector—

24. To visit from time to time leased lands where oil and gas mining operations are being conducted, and to inspect and supervise such

operations with a view to preventing waste of oil and gas, damage to oil or water bearing formations, or to coal measures or other mineral-bearing deposits, or injury to property or life, in accordance with the provisions of these regulations.

25. To make reports to the superintendent and to the Bureau of Mines as to the general conditions of the leases, property, and the manner in which operations are being conducted and his orders complied with.

67 26. To consult and advise with the superintendent as to the condition of the leased lands, and to submit information and recommendations from time to time for safeguarding and protecting the property of the lessor and securing compliance with the provisions of these regulations.

27. To give such orders or notices as may be necessary to secure compliance with the regulations and to issue all necessary instructions or orders to lessees to stop or modify such methods or practices as he may consider contrary to the provisions of such regulations.

28. To modify or prohibit the use or continuance of any operation or method which, in his opinion, is causing or is likely to cause any surface or underground waste of oil or gas, or injury to any oil, gas, water, coal, or other mineral formation, or which is dangerous to life or property, or in violation of the provisions of these regulations.

29. To prescribe, subject to the approval of the superintendent, the manner and form in which all records or reports called for by these regulations shall be made by the lessee.

30. To prohibit the drilling of any well into any producing sand when in his opinion and with the approval of the superintendent the marketing facilities are inadequate, or insufficient provision has been made for controlling the flow of oil or gas reasonably to

68 be expected therefrom, until such time as suitable provision can be made.

31. To prescribe or approve the methods of drilling wells through coal measures or other mineral deposits.

32. To determine when and under what conditions a producing well may be drilled deeper, and under what conditions a producing well, or sand, may be abandoned.

33. To require that tests shall be made to detect waste of oil or gas or the presence of water in a well, and to prescribe or approve the methods of conducting such tests.

34. To require that any condition existing subsequent to the completion of a well which is causing, or is likely to cause, damage to an oil, gas, or water bearing formation, or to coal measures, or other mineral deposits, or which is dangerous to life or property, be corrected as he may prescribe or approve.

35. To approve the type or size of separators used to separate the oil, gas, or water coming from a well.

36. The inspector may limit the percentage of the open-flow capacity of any well which may be utilized when, in his opinion, such action is necessary to properly protect the gas-producing formation.

37. The inspector shall be the sole judge of whether his orders have been fully complied with and carried out.

DUTIES OF LESSEES

38. Before actual drilling or development operations are commenced on the leased lands, or within not less than 30 days from the date of approval of these regulations, in case of producing leases or leased lands on which such operations have been commenced prior to such approval, the lessee or assignee shall appoint a local or resident representative within Osage County of Oklahoma on whom the superintendent or other authorized representative of the Department of the Interior may serve notices or otherwise communicate with in securing compliance with these regulations, and shall notify the superintendent of the name and postoffice address of the representative so appointed.

In the event of the incapacity or absence from the county of such designated local or resident representative, the lessee shall appoint some person to serve in his stead, and in the absence of such representative or of notice of the appointment of a substitute any employee of the lessee upon the leased premises, or the contractor or other person in charge of drilling or related operations thereon, shall be considered the representative of the lessee for the purpose of service of orders or notices as herein provided, and service upon any such employee, contractor, or other person shall be deemed service upon the lessee.

39. Five days prior to the commencement of drilling operations lessee shall submit, on forms to be furnished by the superintendent, a report in duplicate showing the location of the proposed wells.

40. Lessee shall keep upon the leased premises accurate records of the drilling, redrilling, or deepening of all wells, showing formations drilled through, casing used, together with other information as indicated on prescribed forms to be furnished by the superintendent, and shall transmit such and other reports of operations when required by the superintendent.

41. Lessee shall furnish on the 1st day of January and the 1st day of July of each year a plat, in manner and form as prescribed by the superintendent, showing all wells, active or abandoned, on the leased lands, and other related information. Blank plats will be furnished upon application.

42. Lessee shall clearly and permanently mark all rigs or wells in a conspicuous place with the name of the lessee and the number

or designation of the well, and shall take all necessary precautions for the preservation of these markings.

43. Lessee shall not drill within 300 feet of boundary line of leased lands, except with the consent of the superintendent. Lessees shall not locate any well or tank within 200 feet of any public highway or any building used as a dwelling, granary, barn, or established watering place, except with the written permission of the superintendent.

71 44. Lessee shall notify the superintendent in advance of intention to use the mud fluid process of drilling, so that the inspector may approve the method and material to be used in the event the operator is not familiar with this process.

45. Lessee shall provide a properly prepared slush pit, into which all sand pumpings and other materials extracted from the well during the process of drilling shall be deposited. Such sand pumpings and materials shall not be allowed to run over the surface of the land. The construction of such pits shall be subject to the approval of the inspector.

46. Lessee shall effectually shut out and exclude all water from any oil or gas bearing stratum and take all proper precautions and measures to prevent the contamination or pollution of any fresh-water supply encountered in any well drilled for oil or gas.

47. Lessee shall protect to the satisfaction of the inspector each productive oil or gas bearing formation drilled through for the purpose of producing oil or gas from a lower formation.

48. Lessee shall place an approved gate valve or other approved controlling device on the innermost string of casing seated in the well, and keep same in place and in proper condition for use until the well is completed, whenever drilling operations are commenced in "wildcat" territory or in a gas or oil field where high

72 pressures are known to exist, whenever the inspector shall deem same necessary for the proper control of the production from the well.

49. When natural gas is encountered in commercial quantities in any well, lessee shall confine such gas to its natural stratum until such time as the same can be produced and utilized without waste, it being understood that a commercial quantity of gas produced by a well is any unrestricted flow of natural gas in excess of 2,000,000 cubic feet per 24 hours: Provided, That if in the opinion of the superintendent gas of a lesser quantity shall be of commercial value the superintendent shall have authority to require the conservation of said gas. Water shall not be introduced into any well where such introduction will operate to kill or restrict the open flow of gas therein.

50. Lessee shall separate the oil from the gas when both are produced in commercial quantities from the same formation or under such conditions as might result in waste of oil or gas in commercial quantities.

51. Lessee shall not use natural gas from a distinct or separate stratum for the purpose of flowing or lifting the oil.

52. Lessee shall prevent oil or gas, or both, from escaping from any well into the open air, and not permit any oil or gas well to go wild or to burn wastefully.

53. Lessee shall not use natural gas in place of steam to
73 operate engines or pumps under direct pressure, except with the special permission of the inspector.

54. Lessee shall not use natural gas in flambeau lights, save as authorized or approved by the inspector.

55. Lessee shall use every possible precaution, in accordance with the most approved methods, to stop and prevent waste of natural gas and oil, or both, at the wells and from connecting lines and to prevent the wasteful utilization of such gas about the well.

56. Lessee shall notify the superintendent a reasonable time in advance of starting work of intention to redrill, deepen, plug, or abandon a well; and whenever the superintendent or inspector has given notice that extra precautions are necessary in the plugging of wells in a particular territory lessee shall give at least three days' advance notice of such intended plugging.

57. Lessee shall not abandon any well for the purpose of drilling deeper for oil or gas unless the producing stratum is properly protected, and shall not abandon any well producing oil or gas except with the approval of the superintendent or where it can be demonstrated that the further operation of such well is commercially unprofitable.

58. Lessee shall plug and fill all dry or abandoned wells on the leased lands in the manner required, and where any such
74 well penetrates an oil or gas bearing formation it shall be thoroughly cleaned to the bottom of the hole before being plugged or filled, and shall then be filled with mud-laden fluid of a consistency approved by the inspector, from the bottom to the top thereof, before any casing is removed from the well, or, in lieu of the use of such mud fluid, each oil and gas bearing formation shall be adequately protected by cement or approved plugs, or by both such plugs and cement, and the well filled in above and below such cement or plugs with material approved by the inspector.

Where both fresh water and salt water are encountered in any dry or abandoned well which is not being filled with mud-laden fluid as hereinbefore provided, the fresh water shall be efficiently protected against contamination by cement or approved plugs, or by both such cement and plugs, to be placed at such points in the well as the inspector shall approve for the protection of the fresh water.

59. If such abandoned or dry well be in a coal bed or other mineral vein deposit, or be in such condition as to warrant taking extraordinary precautions, the inspector may require such variations in the above-prescribed methods of plugging and filling as may be neces-

sary in his judgment to protect such seam or deposit against infiltration of gas or water and to protect all other strata encountered in the well.

60. The manner in which such mud-laden fluid, cement, or plugs shall be introduced into any well being plugged and the type of plugs so used shall be subject to the approval of the inspector.

In the event the lessee or operator shall fail to plug properly any dry or abandoned well in accordance with these regulations, the superintendent may, after five days' notice to the parties in interest, plug such well at the expense of the lessee or his surety.

61. All B-S or water from tanks or wells shall be drained off into proper receptacles located at a safe distance from tanks, wells, or buildings, to the end that same may be disposed of by being burned or transported from the premises.

Where it is impossible to burn the B-S, or where it is necessary to pump salt water in such quantities as would damage the surface of the leased land or adjoining property, or pollute any fresh water, the lessee shall notify the superintendent, who shall give instructions in each instance as to the disposition of such B-S or salt water.

62. Lessee shall make a full and complete report to the superintendent of all accidents or fires occurring on the leased premises.

63. Lessee shall provide approved tankage of suitable shape for accurate measurement, into which all production of crude oil shall be run from the wells, and shall furnish the superintendent copies of accurate tank tables and all run tickets, as and when requested.

64. The superintendent may make arrangements with the purchasers of oil for the payment of the royalty, but such arrangements, if made, shall not relieve the lessee from responsibility for the payment of the royalty, should such purchaser fail, neglect, or refuse to pay the royalty when it becomes due: Provided, That no oil shall be run to any purchaser or delivered to the pipe line or other carrier for shipment, or otherwise conveyed or removed from the leased premises, until a division order is executed, filed, and approved by the superintendent, showing that the lessee has a regularly approved lease in effect, and the conditions under which the oil may be run. Lessees shall be required to pay for all oil or gas used off the leased premises for operating purposes; affidavit shall be made as to the production used for such purposes and royalty paid in the usual manner. The lessee or his representative shall be present when oil is taken from the leased premises under any division order and will be responsible for the correct measurement thereof and shall report all oil so run.

The lessee shall also authorize the pipe-line company or the purchaser of oil to furnish the superintendent with a monthly statement, not later than the tenth day of the following calendar month, of the

gross barrels run as common-carrier shipment or purchased from his lease or leases.

65. Lessee will not be permitted to use any timber from any Osage lands except under written agreement with the owner, and
77 in all cases where lands are restricted such agreement shall be subject to the approval of the superintendent or inspector. Lessee shall, when requested by the superintendent, furnish a statement under oath as to whether the rig timbers were purchased on the leased tract, and if so, state the name of the person from who purchased, and give such other information regarding the procurement of timber as the superintendent may desire.

66. The use of and damages to surface of lands shall be settled as provided in the lease.

67. Failure to comply with any provision of the lease or of these regulations shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a fine or not more than $500 per day for each and every day the terms of the lease or of the regulations are violated, or the orders of the superintendent pertaining thereto are not complied with, or to both such fine and cancellation, in the discretion of the Secretary of the Interior: Provided, That the lessee shall be entitled to notice and hearing with respect to the terms of the lease or of the regulations violated, which hearing shall be held by the superintendent, whose finding shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the superintendent's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

68. These regulations shall become effective and in full force
78 from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: Provided, That no regulations made after the approval of any lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties to the lease.

69. Applications, leases, and other papers must be upon forms prescribed by the Secretary of the Interior, and the superintendent will furnish prospective lessees with such forms at a cost of $1 per set.

Form A.—Application for oil and gas lease, including financial showing.

Form B.—Oil lease.

Form C.—Gas lease.

Form D.—Bond.

Form E.—Authority of officers to execute papers.

Form F.—Assignment.

Form G.—Collective bond.

All sums received from sale of forms shall be placed in a special fund, to be expended under the direction of the Commissioner of Indian Affairs for the expenses necessary to carry out these regulations.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
August 26, 1915.

79 The foregoing regulations are respectfully submitted to the Secretary of the Interior with the recomendation that they be approved.

E. B. MERITT,
Assistant Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIOR,
August 26, 1915.

Approved:

FRANKLIN K. LANE.

AMENDMENT NO. 1 TO REGULATIONS APPROVED AUGUST 26, 1915, GOVERNING THE LEASING OF LANDS IN THE OSAGE RESERVATION FOR OIL AND GAS MINING PURPOSES. APPROVED MAY 22, 1916

Section 68 of the regulations provide:

"These regulations shall become effective and in full force from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: Provided, That no regulations made after the approval of any lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties to the lease."

Section 7 of said regulations provide as follows:

"In the event that no acceptable offer is received at the
80 public sale for any producing oil unit, the sublessee shall be permitted to continue the development and operation of such unit and to have a lease on the same, and such acreage shall not be considered as a part of the 4,800 acres which he is entitled to hold under these regulations."

In view of the misinterpretation and understanding of section 7 and in accordance with the provisions of section 68 said section 7 is hereby modified and changed to read as follows:

"In the event that no acceptable offer is received at the public sale for any producing oil unit any such unit shall thereafter be disposed of or leased in such manner as the Secretary of the Interior may direct."

FRANKLIN K. LANE.

AMENDMENT NO. 2 TO THE REGULATIONS OF AUGUST 26, 1915. APPROVED JULY 8, 1916

"Where casing-head gas is sold by the oil lessee as provided in paragraph 12 of oil leases executed in accordance with the regulations of the department, approved August 26, 1915, he shall pay one-sixth of the proceeds of such sale to the United States Indian super-

intendent as royalty for the Osage Tribe, and where such gas is used by the lessee for the manufacture of gasoline he shall pay one-sixth of the value thereof to such superintendent as royalty, such
81 value to be the general average value of gas of like kind and quality in the vicinity, such general average to be ascertained by the United States Indian superintendent from written contracts for sale of gas on file at the Indian agency. In all cases where casing-head gas is used by the lessee in the manufacture of gasoline, the same shall be metered in accordance with the terms of the lease and under such rules and regulations of the department as may be in force governing the sale: Provided, That should such gas be sold or disposed of in any manner other than by the oil lessee in the operation of his lease after extracting the gasoline there shall be paid to said superintendent for the Osage Tribe a royalty of one-sixth of the proceeds of such sale: Provided further, That all contracts for sale of such casing-head gas shall contain a clause requiring a minimum price for such gas of four cents per thousand cubic feet at a pressure of ten ounces to the square inch. The price of four cents per thousand cubic feet shall be based on a price of eight cents or less per gallon for the finished product. Should the price of this product during any month be greater than eight cents per gallon, then the price of gas shall be greater than four cents per thousand cubic feet by one-half cent per thousand cubic feet for each one cent increase in the price per gallon of gasoline. For example: Should such price of gasoline be eleven cents per gallon, then the price would be five and one-half cents per thousand cubic feet for gas. If such price of the product be twelve cents per gallon, then the price for gas should be six cents, and so on. Such price shall be determined by the
82 best price paid for casing-head gasoline at gasoline plants by any responsible dealer during the calendar month during which such casing-head gas is delivered."

In United States District Court

Opinion

THOMSON, *J.:*

These two actions involving the same legal questions are brought by the executor of the last will and testament of Glenn T. Braden, deceased, to recover back the amount of certain taxes assessed on the income of decendent from a certain lease for oil and gas purposes from the Osage Tribe of Indians under lands located in Osage County, Oklahoma. The taxes were paid by the decedent to the respective collectors of internal revenue under protest to avoid distraint and sale of decedent's property. An affidavit of defense identical in character was filed in each case, and the parties recognizing that the facts on which plaintiff's right of recovery depends are not in dispute, and that the fundamental questions involved are of law, have filed stipulations of record covering the material facts, leaving the issue, one of law, for the determination of the court. Under the

admissions in the pleadings as modified by the stipulations, the following facts appear:

1. The oil deposits in question in Osage County, Oklahoma, were and still are the exclusive property of the Osage Indian Tribe, and in its capacity as a tribe or nation.

2. The Osage Tribe of Indians have at all times been, and
83 now are wards of the National Government; the relation of the United States as guardian of said tribe rests upon treaty obligations, acts of Congress and policies adopted by the Government in dealing with the tribe, and the tribe has at all times been, and now is, considered by the United States as a dependent people.

3. From time immemorial all tribal funds and property, including the oil deposits in question, of the Osage Tribe of Indians have been and are held in trust for them as wards of the Government of the United States as their guardian, and this status as to these oil deposits will not expire before April 7, 1946. The acts of Congress which deal with these matters are special and not general acts.

4. Under the terms of this legislation the setting apart of the land under which are these oil deposits was in order to provide the tribe with a reservation, and the same was so set apart for them.

5. Under this legislation the oil and other minerals covered by these lands were reserved for said period for the use of the tribe, the royalty in respect thereof to be paid to the tribe, the leases for all oil to be made by the Osage Tribe, through its tribal council, with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe, all funds belonging to the tribe, which may become due, or found to be due to the tribe, to be held in trust by the United States.

84 6. The rules and regulations which, by the stipulations, are made a part of the statement of claim are pursuant to the special congressional legislation and contain a copy of the form of the oil mining leases.

7. The United States, by virtue of this guardianship relation, has exercised absolute dominion and control as guardian over these oil deposits, and is, and has been at all times, holding the same in trust for the use and benefit of the Indians, except that the lease, as stated, made pursuant to these acts of Congress, is required by Congress to be executed by the tribal council, but is not valid unless approved by the Secretary of the Interior.

8. Glenn T. Braden, the decedent, in his lifetime was owner of an interest in such a lease in respect of said oil deposits, from a date prior to the year 1917, as oil lessee, under due approval by the Secretary of the Interior, to-wit, as to a particular portion of the property of the said tribe, and as described in paragraph 8 of the plaintiff's statement of claim, and in compliance with the terms of said lease and the rules and regulations of the Department of the Interior, Braden drilled a number of oil wells thereon and produced large quantities of oil therefrom.

9. The royalty which the said Braden, under the terms of said lease, was to pay on the oil produced from the lease was 16⅔ per cent of the gross proceeds from the sale of the oil produced thereon from wells producing one hundred barrels or less and exceeding that amount, 20 per cent.

85 10. Upon threat of the respective collectors to enforce payment of the taxes assessed, with penalties and interest, by distraint and sale of his property, Braden paid the taxes set forth in the statements of claim under protest, no part of which has been refunded.

In these circumstances the question is, as the law now stands, can the United States lawfully assess and collect from the lessee of the lands of its ward, the Osage Indian Tribe, a tax on the net income arising from such lease?

If the State of Oklahoma were attempting by legislative act to levy a tax for the support of the State from this same net income of the lessee, it would certainly fail. The Supreme Court has distinctly announced certain principles in decisions closely touching the question now before the court which would not only preclude the State from collecting such tax, but by analogy are practically conclusive against the Government's claim.

The taxing powers of a State are of the broadest character. This is an incident of sovereignty, and all subjects over which the sovereign powers of a State extend are objects of taxation. Concerning these the Federal Government undertakes to exercise no supervision or control, never attempting to interfere unless the State taxation results in national interference. In Shaffer vs. Carter, 252

86 U. S., page 37, the Supreme Court quoting from Justice Brewer in a former case, said:

"We have had frequent occasion to consider questions of State taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the Nation over State taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. The power of taxation, however, vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business * * *. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

But vast as the powers of State taxation are, they must not and can not interfere with the functions and operations of the Federal Government.

In Choctaw, Oklahoma & Gulf Railroad Company vs. Harrison, 235 U. S. 292, appellant was a railroad corporation with power to lease and operate coal mines in the region formerly known as Indian Territory, now in the State of Oklahoma. The Choctaw and
87 and Chickasaw Indians, as wards of the United States, owned a large area of segregated and unallotted lands containing coal deposits which are not subject to taxation by the State. In 1908 the State of Oklahoma passed an act entitled "An act providing for the levy and collection of a gross revenue tax from * * * persons, firms, corporations, or associations engaged in the mining or production of coal." The act subjects every such person, firm, association, or corporation engaged in the mining or production, within the State, of coal to a gross revenue tax, which was in addition to the taxes levied and collected on an ad valorem basis upon such mining property, and the appellant, declining to pay the tax assessed upon the gross receipts for sales, the sheriff was about to enforce the demand by levy. The lower court and the Supreme Court of Oklahoma held that the effect of the act was to lay a valid tax on personalty, and sustained the levy and assessment. This was reversed by the Supreme Court, that tribunal saying:

"From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency can not be subjected to an occupation or privilege tax by a State. (McCulloch v. Maryland, 4 Wheat. 316, 425; and Farmers Bank v. Minnesota, 232 U. S. 516.)

But it is insisted that the statute rightly understood prescribed
88 only an ad valorem imposition on the personal property owned by the appellant—the coal at the pit's mouth—which is permissible according to many opinions of this court."

But the court held that:

"Neither State courts nor legislature by giving a tax particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."

The court held the clear purpose of the act is to reach all sales and secure a certain percentage thereon, and in effect the statute prescribes an occupation tax, which, under the statutes, the State had no legal power to enforce against the appellant.

In Indian Territory Illuminating Oil Company vs. State of Oklahoma, 240 U. S. 522, the Osage Tribe of Indians made a lease which conferred the privilege of prospecting, drilling wells, mining, and producing petroleum and natural gas upon lands in Oklahoma territory. The appellant oil company was assignee of the lease and opposed the claim of Oklahoma that it was subject to tax, asserting that under the lease and assignment it became "a Federal agent in the development of the lands of the Indians and that its business, license, or permit as such can not be taxed by the State government."

The Supreme Court held that oil leases of land in Oklahoma made by the Osage Tribe of Indians, under authority of the acts of February 28, 1891, and March 3, 1905, are under the protection of the Federal Government, and the lessee is a Federal instrumen-
89 tality, and the State can not, therefore, tax its interest in the leases either directly or as the leases are represented by the capital stock of the corporation owning them. The court said:

"A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. If they can not be taxed as entities, they can not be taxed vicariously by taxing the stock, whose only value is their value."

The court cited with approval the case of Choctaw & Gulf Railroad vs. Harrison, supra, and held that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.

A case identical with the case at bar, except that the question was as to the power of the State to tax, is Gillespie vs. Oklahoma, 257 U. S. 501. Under the laws of Oklahoma every person of the State is made liable to a tax upon his entire net income arising from all sources, except such as is exempt from taxation by some law of the United States or of the State. The State sought to hold the defendant liable for taxes upon the net income derived by him as lessee from leases of restricted Indian lands, the leases being of the same kind as that dealt with in Choctaw & Gulf Railroad v. Harrison, and the Indian Territory Illuminating Oil Company vs. Oklahoma. The Supreme Court of Oklahoma held the tax valid, reversing the court
90 below. The Supreme Court reversed the judgment. The court cited with entire approval the two cases above referred to and held that a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them; and that the step from this to the invalidity of the tax upon income from the leases is not long; that the same considerations that invalidates a tax upon the leases invalidates a tax upon the profits of the leases, and that a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.

These cases establish beyond controversy the invalidity of such a tax as is levied here if the same were assesed and levied by the State of Oklahoma. Keeping in mind the principles thus enunciated and the reasons upon which they are based—is the tax here sought to be imposed by the Federal Government against the proceeds of the lands of its ward a valid tax? The question of the limitation of the power of Congress to levy such a tax, if it definitely attempted to legislate for that purpose, is not involved in this controversy. Over taxation Congress has almost unlimited power, and I am not prepared to say that under such power it could not levy a tax upon the lands of its ward or the proceeds derived from those lands. The

real question is, has Congress attempted to do any such thing through the legislation heretofore enacted? It is conceded that all tribal funds and property of the Osage Tribe, including the oil deposits in question, have been and are "inalienable in any form and subject to no form of encumbrance," and it is clear that if the Government levied a tax which the Indians were either unable or unwilling
91 to pay involuntary sale of the property would result. It would seem that to encumber the lands of its ward by the lien or burden of taxes would be wholly inconsistent with its trust to protect the property of the tribe from all forms of alienation and encumbrance. Under the character of the trust existing between the Government and the Osage Tribe it would seem impossible for the former to subject the lands of the latter to taxation without a clear violation of the trust which it owes to its comparatively defenseless wards.

The question we have is one of intent, of the proper interpretation of the law as it is written. The income tax laws are general statutes, and on this account, as well as upon other settled principles of interpretation, an intent by implication will not be imputed to Congress to tax the ward for the benefit of the guardian. The very opposite would be assumed and it would require the most explicit words to manifest an intention on the part of Congress to do this clearly improper thing. It was held in Evans vs. Gore, 253 U. S. 245, that the sixteenth amendment simply removed obstacles and did not create sources of taxation, and that the function of the revenue acts, in pursuance of that amendment is to reach all recognized sources of taxation, but not to enlarge them. "Any source" clearly means any recognized taxable source—not taxable as a matter of power, but as a matter of intent not to depart from the settled and absolutely just policies of the Government toward the Indians as its wards. The Supreme Court has held in many cases that the Indian wards
92 are favored in the interpretation of Federal statutes, and it is a well-recognized canon of construction that statutes levying taxes are construed most strongly against the Government and in favor of the citizen. That such construction as contended for by the Government is not sound is held by Attorney General Sargent in an opinion in relation to the Quapaw Indians, rendered March 20, 1925, approved by the Secretary of the Treasury. The Attorney General there held that there was nothing in the treaty or acts of Congress with respect to the Quapaw Indians in so many words, stating that the Quapaw lands should be free from taxation. But there, as here, the word was "inalienability," and he reached the conclusion that "inalienability" in that case meant freedom from taxation or interference in any way by the Federal Government, and in passing noticed that the lands that they had relinquished had not been subject to any such taxation or interference. His conclusion was:

"In order to make this restriction against alienation properly effective it would seem that inalienability and nontaxability should go hand in hand, at least until Congress clearly provides otherwise * * *."

This decision was in harmony with the conclusion of Attorney General Daugherty in an opinion rendered March 15th, 1924, and approved by the Secretary of the Treasury. The opinion involved the question whether income received by the individual members of the Five Civilized Tribes of Indians from tax-exempt lands allotted in severalty by the United States is subject to taxes imposed
93 by the revenue acts. In supporting his conclusion that they were not subject to taxation, he used this language:

"While these funds (incomes) are in the hands of the Federal Government, kept in the United States Treasury, and not paid out or pledged except under the consent of the Government, a State has no right to tax them.

If a State cannot tax them the question arises, Is it proper or legal for the Federal Government to tax them? Is it consistent for it to guard this income from the State taxing power and surrender it to congressional authority? Would such procedure be consistent with its policy toward the Indian as protector and conservator?"

As the exercise of taxing power by Oklahoma might destroy the value of the lands to the Indians, so, probably, the exercise of like taxing power by the Government would have such destructive effect. Braden, the decedent in this case, is not taxed, not because the United States was without power to tax him but because in the discharge of its obligation as guardian it has refused to exercise such power to the manifest detriment of its wards.

Being of the opinion that the power exercised by the Government is not supported either on principle or by authority, judgment will be entered for the plaintiff against the collector of internal revenue in each of said cases for the amounts set forth in the respective statements of claim, with interest from the several dates when payment was made.

94 In United States District Court

Stipulation re printing record and abiding by the decision of No. 3272 Law

The defendant in the above case having this day sued out a writ of error from the Circuit Court of Appeals for the Third Circuit to the District Court of the United States for the Western District of Pennsylvania from the judgment entered on March 6, 1926, as of December 31, 1925, it is hereby stipulated by and on behalf of the the plaintiff in error and the defendant in error that since the questions in this case are identical with those involved in the writ of error at No. ———, ————, term, 1926, of the Circuit Court of Ap-

peals for the Third Circuit, and the material portions of the record in said other case are the same in this, no transcript shall be printed in this case, and the decision in this case shall abide by and follow the decision in the other case at said No. ———, ———— term, 1926.

Dated March 23, 1926.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff,
(Deft. in Error).
JOHN D. MEYER,
W. J. AIKEN,
Attorneys for Defendant,
(Pltf. in Error).

95 In United States District Court

Assignments of error

And now, to wit, March 23rd, A. D. 1926, comes the plaintiff-in-error by John D. Meyer, United States Attorney, and W. J. Aiken, Assistant United States Attorney, attorneys for said plaintiff-in-error, and in connection with the petition for writ of error says that in the record, proceedings, and in the final judgment aforesaid manifest error has intervened, to the prejudice of the plaintiff-in-error, to-wit:

1. The court erred in not sustaining the affidavit of defense, raising questions of law of the plaintiff-in-error, the defendant below, in answer to the statement of claim of the plaintiff below and the defendant-in-error here.

2. The court erred in entering judgment in favor of the defendant-in-error, the plaintiff below, and against the plaintiff-in-error, the defendant below, in the sum of $411,127.07.

3. The judgment ordered by the court to be entered is contrary to law.

By reason whereof the plaintiff-in-error prays that the judgment aforesaid may be reversed, etc.

JOHN D. MEYER,
United States Attorney.
W. J. AIKEN,
Assistant United States Attorney.

96 In United States District Court

Stipulation re printing record

The defendant in the above case having this day sued out a writ of error from the Circuit Court of Appeals for the Third Circuit to the District Court of the United States for the Western District of

Pennsylvania from the judgment entered on March 6, 1926, as of December 31, 1925, it is hereby stipulated by and on behalf of the plaintiff in error and the defendant in error that the following portions of the record in this case shall be printed and constitute the transcript of

1. Statement of claim, to and including the affidavit thereto attached. After which there shall be inserted in parenthesis a statement to the effect that attached to the statement of claim are four exhibits, identified as A, B, C, and D, which are in due form and duly support the allegations with respect to said exhibits in the statement of claim, but the details thereof not being material to the questions before the Court of Appeals or considered relevant thereto the exhibits are not printed.

2. The amendment to the statement of claim, with a like memorandum in parenthesis explaining the non-printing of Exhibit E thereof.

3. Affidavit of defense.

4. Defendant's motion to strike, without printing, the rule to show cause.

97 5. The agreement between the parties in this case and in the case at No. 3271 Law, of the same plaintiff against the former collector, which is the subject of the written writ of error at No. , term, 1926, which agreement is dated December 7, 1925.

6. The stipulation by and on behalf of the parties hereto, filed June 10, 1925, together with " Exhibit 1 " thereof, except Forms C, E, D, G, and F.

7. Opinion of Thomson, J.

8. The docket entries.

9. The stipulation, dated March 23, 1926, at No. 3271 Law, explaining why the transcript of the record of No. 3271 is not printed and agreeing to abide by the decision of this case.

10. Assignments of error.

11. Also this stipulation.

Dated March 23, 1926.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff
(Deft. in Error).
W. J. AIKEN,
Attorney for Defendant
(Pltf. in Error).

98 [Clerk's certificate to foregoing transcript omitted in printing.]

99 [Minute entry of argument and submission, Nov. 1, 1926, omitted in printing.]

100 In United States Circuit Court of Appeals for the Third Circuit. No. 3478, October term, 1926

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT BELOW, PLAINTIFF IN ERROR

VS.

THE COLONIAL TRUST COMPANY, EXECUTOR OF GLENN T. BRADEN, DECEASED, PLAINTIFF BELOW, DEFENDANT IN ERROR

No. 3479, October term, 1926

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT BELOW, PLAINTIFF IN ERROR

VS.

COLONIAL TRUST COMPANY, EXECUTOR OF GLENN T. BRADEN, DECEASED, PLAINTIFF BELOW, DEFENDANT IN ERROR

Opinion

Filed Jan. 11, 1927

In error to the District Court of the United States for the Western District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

BUFFINGTON, C. J.

These cases involve the question, not whether Congress has the power to tax income arising from lands of the Osage Indians, but whether it has exercised that power in the passage of the income tax law. These cases arise under the following facts: By due and joint action of the tribal council and the United States authorities an oil lease on royalty was granted to Glenn T. Braden, the decedent, on certain Osage Indian tribal lands. In pursuance thereof he drilled wells and produced large quantities of oil. Upon his income, so accruing, the Government assessed the tax which his executor paid under protest and thereafter sued the Government to recover back. Such recovery was had, whereupon the collector and the former collector took these appeals.

After due consideration had we find no error in the lower court's action and its judgments are affirmed. The question involved is one of such far-reaching importance as to warrant this court in preparing the full opinion it had intended doing, but a restudy of the opinion delivered by the judge below satisfied us that it is so com-

prehensive, convincing, and illustrative of our view that we
101 adopt it as the opinion of this court and restrict ourselves to summarizing the conclusion reached by ourselves and on which we had purposed to vindicate our action.

First. The oil in place was land (Marshall v. Mellon, 179 Pa. State 371). A tax on the income of that oil was a tax on land, and pro tanto a burden on the tribe in leasing its land for oil purposes—Gillespie v. Oklahoma, 257 U. S. 501, where it is said, "A tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

Second. That at the date of the passage of the income tax act the Osage Indians did not stand in the same relation to the United States as its citizens, but were by the United States regarded as wards under its guardianship and their property under its control and management—Elk vs. Wilkins, 112 U. S. 94, where it is said, "They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian"; Winton vs. Amos, 255 U. S. 373, where it is said, "It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage and dependency."

Third. That as legislation imposing taxation by Government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizen (Gould vs. Gould, 245 U. S. 151; United States vs. Field, 255 U. S. 257), any legislation by Government imposing taxation on its dependent ward must be in certain and indubitable terms (Choate vs. Trapp, 224 U. S. 665).

Fourth. That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the Government to regard and deal with the Indian tribes as wards and dependents the purpose and intent of Congress to change that policy and impose a tax by Government on its ward will not be implied, and the general terms of the income tax statute should not be construed to embrace the Indian wards of the Government. In support of this reference is made to the Quapaw Indians (34 Opinions Attorney General 439), where it is said, "In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian"; and Choate vs. Trapp, supra, where it is said, "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are
102 wards of the Nation, and dependent wholly upon its protection and good faith."

A conclusion in line with United States v. Rickert (188 U. S. 432, and Elk vs. Wilkins, 112 U. S. 94), where it is held that general acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation.

The judgments of the district court are affirmed.

[File indorsement omitted.]

103 In United States Circuit Court of Appeals for the Third Circuit

No. 3478 (List No. 19). October term, 1926

C. G. LEWELLYN, FORMER COLLECTOR, PLAINTIFF IN ERROR

vs.

COLONIAL TRUST CO., EXR., GLENN T. BRADEN, DEC'D., DEFENDANT IN error

Judgment

Filed Jan. 11, 1927

In error to the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 11, 1927.

Per curiam.

BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

104 In the United States Circuit Court of Appeals for the Third Circuit

No. 3479 (List No. 20). October term, 1926

D. B. HEINER, COLLECTOR, PLAINTIFF IN ERROR

vs.

COLONIAL TRUST CO., EXR., GLENN T. BRADEN, DEC'D., DEFENDANT IN error

Judgment

Filed Jan. 11, 1927

In error to the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 11, 1927.

Per curiam.

BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

105 [Clerk's certificate to foregoing transcript omitted in printing.]

106 Supreme Court of the United States

[Titles omitted.]

Order allowing certiorari

Filed May 16, 1927

The petition herein for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MAY 16, 1927.

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